

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In re Application of )  
 )  
ABUNDANT LIFE, INC. ) File No. BPH-930208MA  
 ) Facility ID No. 330  
For a Construction Permit for a New FM Station )  
at Hattiesburg, Mississippi )

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 15, 2002**

**Released: February 25, 2002**

By the Commission:

1. Abundant Life, Inc. ("ALI") has filed a Request for Declaratory Ruling or, in the Alternative, Request for Waiver of Payment Deadline ("Request"), in which it seeks relief from the Commission's requirement that it make its final payment pursuant to its winning bid in Closed Broadcast Auction No. 25 for an FM broadcast station construction permit at Hattiesburg, Mississippi. ALI asserts that it is entitled to such relief because of the pending court appeal filed by Unity Broadcasters ("Unity") of our *Memorandum Opinion and Order* in this case denying Unity's Application for Review of the denial of its Petition to Deny ALI's long-form application.<sup>1</sup> For the reasons set forth below, we deny ALI's Request. Because ALI is in default of its payment obligations, we dismiss its application, assess a default payment of \$67,580.50, and direct Unity to make all required deposits for, and file any necessary amendment to, its competing application for a new FM broadcast station at Hattiesburg, Mississippi.

2. **Background.** Unity and ALI both participated in Closed Broadcast Auction No. 25, which commenced September 28, 1999. They were the only bidders in FM Mutually Exclusive ("MX") Group 76 in that auction. ALI was the winning bidder for the construction permit.<sup>2</sup> Unity timely filed a Petition to Deny ALI's application for the Hattiesburg construction permit, alleging that ALI falsely certified its financial qualifications, and further argued that ALI had not incorporated prior to filing its original (long form) application, as represented in that application.<sup>3</sup>

3. On May 11, 2000, the Mass Media Bureau ("Bureau") issued a staff decision, finding that Unity had not met its burden of producing evidence sufficient to create a substantial and material question of fact as to the issues it raised.<sup>4</sup> Unity timely filed an application for review of the staff decision, and we

---

<sup>1</sup> *Abundant Life, Inc.*, 16 FCC Rcd 4972 (2001) ("*Abundant Life*"), appeal docketed, *Unity Broadcasters v. F.C.C.*, No. 01-1148 (D.C. Cir. Filed March 28, 2001).

<sup>2</sup> *Public Notice*, "Closed Broadcast Auction No. 25 Closes; 91 Winning Bidders in the Auction of 118 Broadcast Construction Permits," 14 FCC Rcd 17186, 17197 (1999).

<sup>3</sup> Ordinarily auction applicants first file a short Form 175 application to participate in an auction. However, Closed Broadcast Auction 25 involved applicants such as ALI and Unity, that had originally filed long Form 301 applications in accordance with procedures that pre-dated our current broadcast auction procedures.

<sup>4</sup> *Letter to Unity Broadcasters and Abundant Life, Inc.*, Ref. No. 1800B3-TSN (Mass Media Bureau, May 11, 2000).

denied the application for review in *Abundant Life*, released February 26, 2001. In the ordering clause of *Abundant Life* we directed the Chief, Audio Services Division, Mass Media Bureau, “to list ALI’s Application for FM Broadcast Station on Channel 226A at Hattiesburg, Mississippi in a public notice announcing that the construction permit for said facility is ready to be granted.” *Abundant Life*, 16 FCC Rcd at 4975.<sup>5</sup>

4. Accordingly, on March 12, 2001, the Bureau issued a public notice announcing that the Hattiesburg construction permit was ready for grant upon ALI’s timely payment of the balance of its winning bid (“*Payment Public Notice*”).<sup>6</sup> In the *Payment Public Notice*, the Bureau set March 26, 2001 as the date on which final payment was due, further setting April 9, 2001 as the deadline by which final payment could be made along with a 5% late penalty (“late payment deadline”), as expressly provided in Section 1.2109(a) of the Commission’s Rules.<sup>7</sup>

5. ALI failed to make its final payment by the March 26, 2001 deadline. On March 28, 2001, Unity filed a Notice of Appeal with the United States Court of Appeals for the District of Columbia Circuit, appealing *Abundant Life*<sup>8</sup> as well as a 1995 Commission order granting ALI relief from a prior failure to pay a required hearing fee.<sup>9</sup> ALI filed its Request Friday, April 6, 2001, the business day before the late payment deadline. It did not make its final payment by the late payment deadline.

6. **Discussion.** *Request for Declaratory Ruling:* ALI argues that, while Unity’s appeal is pending, it is still subject to the “risk and uncertainty” that our ruling will be overturned and our intent to grant the Hattiesburg construction permit to ALI therefore nullified.<sup>10</sup> It bases its argument on our policy that winning auction bidders whose applications are attacked by petitions to deny will not have their applications placed on public notice announcing readiness for grant and final payment deadlines until we have disposed of the petitions to deny.<sup>11</sup> ALI contends that the “risk to which [it] is still subject is no less

---

<sup>5</sup> See 47 C.F.R. § 73.5006(d). In this case the *Payment Public Notice* was not issued until after the Commission in *Abundant Life* specifically ordered the staff to do so. In order to give full effect to our auction payment policies, the Commission directs the staff to issue public notices announcing that the construction permits are ready for grant promptly after dismissing or denying petitions to deny.

<sup>6</sup> *Public Notice*: “FCC Announces It Is Prepared to Grant 3 Broadcast Construction Permits After Final Payment Is Made,” 16 FCC Rcd 5410 (2001). We note that, due to an inadvertent clerical error, the balance figure set forth in *Abundant Life* is incorrect; however, the correct final payment due was provided to ALI in a spreadsheet sent along with the *Payment Public Notice*. ALI has neither disputed the amount nor tendered any portion of the final payment.

<sup>7</sup> *Payment Public Notice*, 16 FCC Rcd at 5410-11; see also 47 C.F.R. §§ 1.2109(a), 73.5003(c).

<sup>8</sup> *Unity Broadcasters v. F.C.C.*, No. 01-1148 (D.C. Cir. filed March 28, 2001).

<sup>9</sup> *Abundant Life, Inc.*, 10 FCC Rcd 9977 (1995). In this matter, the Commission reversed the Managing Director’s decision that affirmed the staff’s dismissal of ALI’s application for failure to pay the hearing fee by the July 19, 1993 deadline. The Commission found that ALI reasonably relied on earlier FM “hard look” processing procedures, which stated that Notices of Acceptance of applications would only be released after the 30-day amendment period. The Notice of Acceptance of ALI’s application was released before the end of the amendment period, and thus ALI did not check for the notice until after it had been issued. ALI’s application was reinstated *nunc pro tunc*.

<sup>10</sup> Request, ¶¶ 6, 8.

<sup>11</sup> *First Report and Order, In the Matter of Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses* (“*Broadcast First Report and Order*”), 13 FCC Rcd 15920, 15985-86, ¶ 166 (1998); *Amendment of Part 1 of the Commission’s*

than the risk to which it was previously subject,” and thus that what it contends is the rationale underlying the previously cited policy of the *Broadcast First Report and Order* and *Third Report and Order* continues until final disposition of Unity’s appeal.<sup>12</sup> ALI thus seeks a declaratory ruling allowing it to avoid timely compliance with the auction payment provisions of 47 C.F.R. § 73.5003(c).

7. We find no merit in ALI’s argument, and therefore deny ALI’s request for declaratory ruling (and, as discussed below, likewise deny its request for a waiver of the payment deadline). ALI essentially questions whether the auction final payment procedures set forth in 47 C.F.R. § 73.5003(c) should apply in this case. That section, however, clearly specifies the procedures to be followed: a winning auction bidder (who has already made the upfront and down payments provided in 47 C.F.R. § 73.5003(a) and (b)) must pay the balance of its winning bid within 10 business days of a public notice announcing that the construction permit is ready for grant. 47 C.F.R. §§ 73.5003(c), 1.2109(a). Section 73.5006(d) of our Rules (47 C.F.R. § 73.5006(d)) provides that “[i]f the Commission denies or dismisses all petitions to deny, if any are filed, and is otherwise satisfied that an applicant is qualified, a public notice will be issued announcing that the broadcast construction permit(s) ... is ready to be granted, upon full payment of the balance of the winning bid(s).” Moreover, a winning bidder that fails to make its final payment within 10 business days of the final payment public notice is given only 10 additional business days in which to pay its balance, plus a 5% late penalty. 47 C.F.R. §§ 73.5003(c), 1.2109(a). Thus, the winning bidder’s obligation to tender final payment within a specified time frame after release of the final payment public notice is clear.<sup>13</sup> Declaratory rulings may be issued where necessary to “terminat[e] a controversy or remov[e] uncertainty.” 47 C.F.R. § 1.2. In this case there is no uncertainty to be removed or controversy to be terminated, and a declaratory ruling is therefore unwarranted. *See, e.g., Petitions to Extend the January 1, 1978 Sales Cut-Off Date for 23-Channel CB Radios and CB Receiver/Converters*, 66 FCC 2d 1021, 1024 n. 13 (1977) (denying request for declaratory ruling “in stark contravention of a clear, comprehensive rule.”).

8. Moreover, the clear provisions of Section 73.5003 have a sound policy basis. One of the primary objectives of our auction rules is to ensure that only serious, financially qualified applicants receive licenses and construction permits, and to expedite provision of service to the public. 47 U.S.C. § 309(j)(3)(A); *Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Second Report and Order*, 9 FCC Rcd 2348, 2375 (1994); *Mountain Solutions LTD, Inc.*, 12 FCC Rcd 5904, 5907-08 (Wireless Telecomm. Bureau 1997), *aff’d*, 13 FCC Rcd 21983 (1997), *review denied in part and dismissed in part, Mountain Solutions LTD, Inc. v. F.C.C.*, 197 F.3d 512 (D.C. Cir. 1999) (“*Mountain Solutions*”). We have determined that timely payments of auction obligations are the manner in which we can be assured of the financial qualifications, and thus the seriousness, of a winning bidder. *BDPCS, Inc.*, 12 FCC Rcd 3230, 3235 (1997), *recon. denied in part and granted in part*, 12 FCC Rcd 15341 (1997) (“[I]n order to maintain the integrity of the auction process, and to ensure the efficient provision of services to the public, auction participants are held to certain obligations, such as meeting relevant financial deadlines.”); *see also Mountain Solutions*, 13 FCC Rcd at 21993 (“*The purpose of the second*

---

*Rules – Competitive Bidding Procedures, Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 431-32 (1997) (“*Third Report and Order*”).

<sup>12</sup> Request, ¶ 10.

<sup>13</sup> In its Reply, ALI argues that resolution of its case is not final while the application is “pending,” under the definition in 47 C.F.R. § 1.65. Reply of ALI to Opposition, p. 5 n. 2. However, Section 1.65 concerns the scope of an applicant’s reporting obligations for maintaining the accuracy and completeness of information furnished in a pending application. The language of the section that defines an application as “pending” until a Commission grant or denial “is no longer subject to reconsideration by the Commission or to review by any court,” is limited by its terms to that section only. No such provision appears in our auction rules.

down payment rule is to ensure the financial viability of a license winner and to provide an indication as to the capability of the winning bidder to actually build out its system.” (emphasis in original)). We stated in *Abundant Life* that “ALI has timely made the required upfront and down payments, totaling \$114,270. Thus, further consideration of [the financial qualifications] issue at this time is unwarranted.”<sup>14</sup> Now, however, ALI seeks to delay its final payment, in part because it apparently does not have funds with which to make the payment.<sup>15</sup> Since our competitive bidding procedures are now the means by which we “provide adequate assurance that applicants will be financially qualified,”<sup>16</sup> and as we rejected Unity’s financial qualifications challenge on that ground in *Abundant Life*, we may not now ignore ALI’s failure to make its final payment.

9. ALI appears to misconstrue the nature of our policy by which we will not list a permit as ready for grant until after disposal of outstanding petitions to deny, as well as the reasons underlying that policy. In the *Third Report and Order*, while we noted concerns regarding applicants who face petitions that could potentially result in denial of their applications,<sup>17</sup> we did not state that we would forego seeking payment from such applicants until all appeals were final. The portion of the *Third Report and Order* cited by ALI, in which we discussed “risk and uncertainty,”<sup>18</sup> did not result in any change in our auction payment rules, certainly not in the subsequently adopted auction procedures for commercial broadcast applicants. In the *Broadcast First Report and Order* we indicated that following the close of the auction the staff would issue a public notice announcing a period for filing petitions to deny against the winning bidder. We advised that “[i]f the Commission denies or dismisses all petitions to deny (if any are filed), and is otherwise satisfied that the applicant is qualified, a public notice will be issued announcing that the construction permit is ready to be granted.” *Broadcast First Report and Order*, 13 FCC Rcd at 15985. This is reflected in Section 73.5006(d) of the Commission’s Rules. 47 C.F.R. § 73.5006(d). Pursuant to Section 73.5003(c), the winning bidder “shall pay the balance of its winning bid(s) in a lump sum within ten (10) business days after release of a public notice announcing that the Commission is prepared to award the construction permit . . . .” 47 C.F.R. § 73.5003(c). Contrary to ALI’s assumption, these auction procedures are not intended to shield the winning bidder from having to pay the balance of its winning bid until there is no possibility of its application being denied. Rather, their purpose is to provide sufficient time for the Commission to determine, based upon any petition to deny, whether grant of the application will serve the public interest. Nothing in our auction rules, or in the orders adopting those rules, provides a basis to delay the final payment beyond the deadline date established in the final payment public notice.<sup>19</sup> On the contrary, the *Broadcast First Report and Order* makes clear that the procedures set forth for post-auction petitions to deny, and award of construction permits immediately thereafter, are designed to expedite service to the public.<sup>20</sup>

---

<sup>14</sup> *Abundant Life*, 16 FCC Rcd at 4974.

<sup>15</sup> See discussion at ¶ 15 of the text below.

<sup>16</sup> *Broadcast First Report and Order*, 13 FCC Rcd at 15989 ¶ 176.

<sup>17</sup> *Third Report and Order*, 13 FCC Rcd at 431-32.

<sup>18</sup> *Third Report and Order*, 13 FCC Rcd at 432.

<sup>19</sup> Cf. 47 C.F.R. § 1.106(n) (“Without special order of the Commission, the filing of a petition for reconsideration shall not excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof.”)

<sup>20</sup> *Broadcast First Report and Order*, 13 FCC Rcd at 15985.

10. ALI cites the staff decision in *Anchor Broadcasting Limited Partnership* (“Anchor”)<sup>21</sup> in support of its request to defer final payment until final disposition of the pending appellate proceedings. Its reliance on this case, however, is fundamentally flawed. While the winning bidder in *Anchor* sought the same relief as does ALI, the issue arose in a materially different procedural context. There, winning bidder Anchor questioned whether it should have to make final payment during pendency of an already-filed appeal challenging the validity or applicability of the general broadcast auction procedures to a particular long-standing comparative proceeding. However, Anchor sought relief from final payment before we had issued a public notice triggering Anchor’s obligation to pay. In contrast, in the present case ALI sought to delay payment only after the denial of Unity’s petition to deny and the issuance of a public notice triggering ALI’s obligation to pay the balance of its winning bid by March 26, 2001 (or by April 9, 2001 with the 5% late fee). Fundamentally, at no point during the *Anchor* proceeding did either the Bureau or the Commission waive Anchor’s obligation to make final payment within the deadlines set forth in 47 C.F.R. §§ 1.2109(a) or 73.5003(c), or in a public notice, because of a pending court appeal. Furthermore, Anchor did in fact timely make its final payment within ten business days of issuance of the relevant public notice.<sup>22</sup> The Commission decision in *Anchor* is fully consistent with the decision we reach here: each requires final payment after the public notice required by Sections 1.2109(a) and 73.5003(c), without regard to whether a court appeal might set aside the results of the auction.<sup>23</sup>

11. The integrity of the auction process, and the policies underlying that process, depend on our holding all auction participants to the procedures announced in our rules and in our public notices. ALI has not shown any unresolved controversy or uncertainty regarding our auction payment procedures. We therefore decline to grant the declaratory ruling it seeks.

12. *Request for Waiver:* In the alternative, ALI requests that we waive the payment deadline set forth in the *Payment Public Notice*,<sup>24</sup> for the same reasons it requested the declaratory ruling discussed above. Because Closed Broadcast Auction No. 25 was the first auction of broadcast construction permits, this case presents our first opportunity to address this fact situation in the broadcast context. However, the Commission has considered requests for waiver of second down payments and final payments in other auctioned services, primarily for authorizations issued by the Wireless Telecommunications Bureau

---

<sup>21</sup> *Letter to Anchor Broadcasting Limited Partnership and Galaxy Communications, Inc. from Linda Blair, Chief, Audio Services Division, Mass Media Bureau*, Ref. No. 1800B3-TSN (March 9, 2000), *recon. denied*, *Letter to Anchor Broadcasting Limited Partnership and Galaxy Communications, Inc. from Linda Blair, Chief, Audio Services Division, Mass Media Bureau*, Ref. No. 1800B3-TSN (May 23, 2000) (winning bidder not entitled to delay final auction payment pending court review of a competitor’s challenge regarding general applicability of auction procedures to a particular group of mutually exclusive applicants), *application for review dismissed as moot*, *Anchor Broadcasting Limited Partnership*, 16 FCC Rcd 8167 (2001).

<sup>22</sup> *Public Notice*, “FCC Announces It Is Prepared To Grant 3 Broadcast Construction Permits After Final Payment Is Made,” 15 FCC Rcd 24569 (2000).

<sup>23</sup> We also reject ALI’s contention that the Bureau in *Anchor* “declined to insist on payment until the appeal was finally resolved” (Reply of ALI to Opposition, p. 8 ¶ 19). In denying Anchor’s petition for declaratory ruling, the staff indicated that “Anchor will be listed in a subsequent Public Notice announcing that the construction permit for the above-listed facility is ready to be granted.” *Letter to Anchor Broadcasting Limited Partnership and Galaxy Communications, Inc. from Linda Blair, Chief, Audio Services Division, Mass Media Bureau*, Ref. No. 1800B3-TSN (March 9, 2000). The court appeal, which had commenced before the auction, was resolved before the public notice was issued announcing the payment deadline.

<sup>24</sup> *Payment Public Notice*, 16 FCC Rcd at 5410-11. See 47 C.F.R. §§ 1.2109(a), 73.5003(c).

(“WTB”). Wireless auctions as well as broadcast auctions are governed by the general competitive bidding rules found at 47 C.F.R. § 1.2101 *et seq.*<sup>25</sup>

13. We note at the outset that there is no rule or case holding that a winning bidder may delay a second down payment or final payment because a challenge to the winning bidder’s application is still pending, other than as set forth in 47 C.F.R. § 73.5006(d). In fact, waivers of second down payments or final payments in other auctions generally have not involved requests, such as ALI’s, to suspend completely a payment obligation. Rather, the vast majority of such cases involve retroactive requests occasioned by the winning bidder’s having missed a payment deadline due to inadvertence or administrative error. In these waiver request cases, a waiver was granted where the winning bidder demonstrated prior compliance with Commission rules, good faith, or prompt action to rectify the delinquency; there was no record that the payment shortfall was part of a deliberate effort to delay payment; the public interest would not be served by rigid enforcement of the payment deadline; and some flexibility was appropriate in addressing minor delinquency with respect to the payment. *See, e.g., Electronic SMR Communication Services*, 12 FCC Rcd 1520 (WTB 1997) (bidder submitted amount due upon notification of delinquency and subsequently sought waiver); *Phillip C. Merrill*, 13 FCC Rcd 7408 (Mass Media Bureau, Video Services Division 1998) (MDS bidder missed second down payment deadline, but wired payment plus 5% late fee to Commission three business days after deadline and filed waiver request immediately thereafter); *Metricom, Inc.*, 13 FCC Rcd 890 (1998) (winning bidder’s final payment returned by Mellon Bank, causing it to be late on re-submission; partial waiver granted because Metricom did not deliberately delay payment). Typically in such cases, including those cited above, the waiver was conditioned upon payment of an additional 5% of the final or second down payment as a penalty. In 1998, Section 1.2109(a) of our rules was amended to impose a 5% late penalty for final payments submitted within ten days of the payment deadline,<sup>26</sup> essentially codifying the prior practice. Since amending that rule, we have not waived a final payment deadline in any auction context.

14. Waivers were not granted where it appeared that the party requesting waiver did not have funds on hand on the date of the payment deadline. *Mountain Solutions*, 13 FCC Rcd at 21990-91, 21993. Where a waiver was granted, the winning bidder had either made the payment or demonstrated that it had funds on hand at the time its second down/final payment was due. *See, e.g., Carolina PCS I Limited Partnership*, 12 FCC Rcd 22938, 22944 (1997) (“CPCSI”) (winning bidder showed “continuing financial viability and adequate financial qualifications,” by placing sufficient funds in escrow). *Compare LMDS Communications, Inc.*, 15 FCC Rcd 8618, 8621 (Public Safety and Private Wireless Div., WTB 2000), *recon. denied*, 15 FCC Rcd 23747 (WTB 2000) (“LMDS”), which is an exception to the typical waiver request in that the winning bidder sought a 60-day extension of the final payment deadline in order to arrange financing. The winning bidder in LMDS asserted it had “access” to assets sufficient to pay its full balance, but the assets were “not in a liquid form.” The WTB denied the requested waiver/extension and held that, to obtain a waiver, “the defaulting bidder must demonstrate ‘financial viability based upon the fact that it had access to adequate funds’ at the time its payment is due.” 15 FCC Rcd at 8622, citing, *inter alia*, CPCSI, 12 FCC Rcd at 22944. This holding was based on

<sup>25</sup> *See, e.g.*, 47 C.F.R. § 73.5003 (upfront, first down, and final payments in broadcast and ITFS auctions shall be paid in accordance with procedures set forth in 47 C.F.R. §§ 1.2106, 1.2107(b), and 1.2109(a)); 47 C.F.R. § 73.5004 (broadcast and ITFS auction bid withdrawal procedures to follow 47 C.F.R. §§ 1.2109(b)-(d)); 47 C.F.R. § 73.5006 (petitions to deny may be filed “as set forth in 47 C.F.R. § 1.2108”). *See also Third Report and Order*, 13 FCC Rcd at 431, and 47 C.F.R. § 73.5006(d) (winning bidders not required to submit balance of winning bids until petitions to deny filed against them are dismissed or denied).

<sup>26</sup> *Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures, Third Report and Order and Second Further Notice of Rule Making*, 13 FCC Rcd 374, 515-16 (1997), *summary*, 63 Fed. Reg. 2315, 2343 (January 15, 1998); 47 C.F.R. § 1.2109(a).

the policy that “the overall integrity of the auction process itself depends on timely payments by winning bidder,” and that “prompt payment is an objective indicator that a winning bidder is financially able to meet its obligations and intends to provide service to the public.” *LMDS*, 15 FCC Rcd at 8621; *see also CPCS*, 12 FCC Rcd at 22944-45 (timing of down payment obligations meant to discourage financially unqualified bidders).

15. ALI, on the other hand, fails to support its waiver request with sufficient evidence to show its financial viability. On the contrary, what evidence ALI does produce indicates that it does not currently have funds in hand with which to make its final payment. Declaration of Rev. Kenneth Fairley (attached to ALI’s Reply to Opposition), ¶ 4 (“ALI was advised that, while financing remains available, the lender would be unwilling to advance funds until the cloud of Unity’s litigation had been removed.”). ALI does not offer any other rationale to demonstrate that the public interest would be served by a waiver of its final payment deadline. Moreover, waiver of the final payment deadline prevents Unity, as the next-highest bidder, from receiving the Hattiesburg construction permit upon ALI’s default under our auction procedures.<sup>27</sup>

16. ALI protests that “its situation is unique.”<sup>28</sup> We disagree. Our rules and the Communications Act provide an opportunity for administrative and judicial review of staff actions involving petitions to deny. These rules, however, also require final payment of winning auction bids before this process can be completed. The possibility that an applicant may be required to make a final payment prior to finality is a direct and foreseeable consequence of our settled auction procedures. We note that were Unity to prevail on its appeal, ALI would be entitled to a refund of its payments in accordance with established procedures.<sup>29</sup> Thus, ALI has shown neither special circumstances warranting deviation from the rules requiring timely payment, nor that the public interest will be served by waiving its final payment deadline, both of which must be shown before we will waive our rule. *Northeast Cellular Telephone Co. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990), citing *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969). Accordingly, we find that a waiver under these circumstances is unwarranted. ALI’s decision not to make final payment while seeking relief from its obligation renders it in default, subjecting it to the default provisions of our rules.

17. *Effect of ALI’s Default*: Under the Commission’s rules, a winning bidder that fails timely to remit a required payment is deemed to have defaulted on its auction payment obligations.<sup>30</sup> The

<sup>27</sup> In adopting auction rules to govern the resolution of the frozen comparative cases, the Commission indicated its intent to offer the permit to the next highest bidder, rather than conduct a further auction, because this would be more expeditious. *Broadcast First Report and Order*, 13 FCC Rcd at 15952 ¶ 86, 15953 n.81.

<sup>28</sup> Reply of Abundant Life, Inc. to Opposition, ¶ 23.

<sup>29</sup> *Public Notice*, “Auction of C, D, E, and F Block Broadband PCS Licenses, Status of Applications to Participate in the Auction, Clarification of Payment Issue Relating to Licenses Subject to Pending Proceedings,” 14 FCC Rcd 5467, 5470 (1999) (Commission will return all payments made by winning bidders forced to surrender their licenses as a result of final determinations reached in pending judicial proceedings); *see also Implementation of Section 309(j) of the Communications Act – Comparative Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, Reexamination of the Policy Statement on Comparative Broadcast Hearings, Proposals to Reform Comparative Hearing Process to Expedite the Resolution of Cases*, 14 FCC Rcd 16511, 16516 ¶ 13 (1999). However, to the extent a winning bidder is ultimately found disqualified to be a licensee, any refund would be reduced by the default payment set forth in 47 C.F.R. §§ 1.2104(g)(1) and (2).

<sup>30</sup> 47 C.F.R. §§ 1.2109(c), 73.5004(a); *see also National Telecom PCS, Inc.*, 12 FCC Rcd. 10163, 10171-72, ¶ 15 (1997); *Amendment of Part 1 of the Commission’s Rules -- Competitive Bidding Procedures*, *WT Docket No. 97-82, Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd. 374, 434 ¶ 107 (1997).

Commission's rules also provide that under such circumstances, the Commission will dismiss the bidder's application.<sup>31</sup> The announcement of the winning bidder in an auction conducted by the Commission, like the acceptance of high bids in auctions in other settings, terminates the bidding and establishes, as of the moment of acceptance of the high bid, a binding obligation to pay the winning bid price for the licenses.<sup>32</sup> When a payment default breaches the obligation, the winning bidder's liability remains a function of the high bid and is based on the obligation that was incurred at auction.<sup>33</sup> Thus, the defaulting high bidder becomes subject to the default payment provisions of 47 C.F.R. § 1.2104(g). Additionally, 47 C.F.R. § 1.2109(c) provides that, if a winning bidder defaults, "the Commission may either re-auction the license to existing or new applicants or offer it to the other highest bidders (in descending order) at their final bids." The Commission has already determined that, for purposes of Closed Broadcast Auction No. 25, in the event of a winning bidder default, the construction permit is to be offered to the next-highest bidder.<sup>34</sup> These provisions were part of our rules before Auction No. 25 commenced; moreover, the consequences of default were spelled out in several public notices, including the *Payment Public Notice*.<sup>35</sup> Clearly, ALI had notice of those consequences when it chose to participate in the auction.

18. ALI's application will be dismissed, and the Hattiesburg construction permit offered to Unity, the next highest bidder, at its last bid amount.<sup>36</sup> ALI is further subject to the default payment provisions specified in 47 C.F.R. § 1.2104(g).<sup>37</sup> Specifically, ALI is liable for an amount equal to the difference between the amount that it bid and the amount of the subsequent winning bidder's high bid.<sup>38</sup> In addition, ALI is liable for an amount equal to three percent of its defaulted bid or the subsequent winning bid, whichever is less.<sup>39</sup>

<sup>31</sup> 47 C.F.R. §§ 1.2109(b)-(c), 73.5004(b).

<sup>32</sup> 47 C.F.R. §§ 1.2104(g)(2), 73.5004(a); *In re BDPCS, Inc.*, 15 FCC Rcd. 17590, 17599-600, ¶ 16 (2000) ("BDPCS"); see also *Nextwave Personal Communications, Inc. v. FCC*, 200 F.3d 43, 56 (2<sup>d</sup> Cir. 1999), writ of mandamus issued, *In re FCC*, 217 F.3d 125 (2<sup>d</sup> Cir. 2000), cert. denied, 121 S. Ct. 606 (2000).

<sup>33</sup> *BDPCS*, 15 FCC Rcd. at 17599-600, ¶ 16 n. 66; see also *Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, WT Docket 97-82, Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd. 15293, 15328, ¶ 69 (rel. Aug. 14, 2000); *Liberty Productions, A Limited Partnership*, 16 FCC Rcd 12061 (2001), appeal docketed sub nom., *Orion Communications Limited, et al. v. FCC*, No. 01-1279 (D.C. Cir. June 21, 2001).

<sup>34</sup> See footnote 27.

<sup>35</sup> See, e.g., *Public Notice*: "Closed Broadcast Auction – Notice and Filing Requirements for Auction of AM, FM, TV, LPTV, and FM and TV Translator Construction Permits Scheduled for September 28, 1999 – Minimum Opening Bids and Other Procedural Issues," 14 FCC Rcd 10632, 10677 (1999) ("Pre-Auction Public Notice"); *Public Notice*: "Closed Broadcast Auction No. 25 Closes – 91 Winning Bidders in the Auction of 118 Broadcast Construction Permits," 14 FCC Rcd 17186, 17189-90 (1999); *Payment Public Notice*, p. 2 and n. 7.

<sup>36</sup> See footnote 27.

<sup>37</sup> See also 47 C.F.R. §§ 1.2109(c), 73.5004(a).

<sup>38</sup> *Id.* The default payment amount, in the event a bidding credit applies, is calculated on the difference between the net bid amounts or the gross bid amounts, whichever is less. 47 C.F.R. §§ 1.2104(g)(1)-(2). See also *Broadcast First Report and Order*, 13 FCC Rcd at 15952 ¶ 86 (upon winning bidder's default, Commission will offer construction permit to next highest bidders in descending order at their final bids).

<sup>39</sup> 47 C.F.R. § 1.2104(g)(2).

19. **Conclusion / Ordering Clauses.** For the foregoing reasons, ALI's Request for Declaratory Ruling or, in the Alternative, Request for Waiver of Payment Deadline IS DENIED.

20. ALI is in default, and consequently its application for an FM broadcast station at Hattiesburg, Mississippi, File No. BPH-930208MA IS DISMISSED.<sup>40</sup>

21. IT IS HEREBY ORDERED that ALI is assessed a default payment under 47 C.F.R. § 1.2104(g)(1) of \$52,000, representing the difference between its net winning bid and Unity's high net bid, and under 47 C.F.R. § 1.2104(g)(2) in the amount of \$15,580.50, representing 3% of Unity's high net bid, for a total default payment of \$67,580.50, to be deducted from ALI's upfront and down payments totaling \$115,000, already on deposit with the Commission. Therefore, in accordance with Section 1.2104 of the Commission's rules, the Commission is prepared to refund to the payor(s) of record the balance of \$47,419.50. To obtain a refund, the payor(s) of record must contact the Office of Managing Director, Financial Operations, Auctions Accounting Group.<sup>41</sup>

22. The Chief, Audio Services Division, Mass Media Bureau, IS HEREBY DIRECTED to proceed in accordance with 47 C.F.R. §§ 1.2104, 1.2107, 1.2109, and 73.5004, and paragraph 86 of the *Broadcast First Report and Order*.<sup>42</sup> In accordance with 47 C.F.R. §§ 1.2107(b) and 73.5003(b), Unity Broadcasters must deposit with Mellon Bank in Pittsburgh, Pennsylvania, within ten (10) business days of the release date of this *Memorandum Opinion & Order*, such funds as are necessary to bring its total deposits up to twenty percent (20%) of its net high bid. If Unity Broadcasters needs to submit an amendment to its previously filed long-form application (File No. BPH-19930208MC), it must do so within 30 days of the release date of this *Memorandum Opinion and Order*, in accordance with 47 C.F.R. § 73.3513 and with the same number of copies as the originally filed long-form application. The amendment may not constitute a major change from either the technical or legal proposal specified in the previously filed long-form application. Any amendment shall include, to the extent not already provided by Unity, the exhibits mandated by 47 C.F.R. §§ 73.5005(a), 1.2107(d), 1.2110(j), and 1.2112(a) and (b). After the 30-day amendment period, Unity's application will be placed on public notice, starting the period for filing any petitions to deny.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton  
Acting Secretary

<sup>40</sup> On November 30, 2001, Unity filed a "Motion for Immediate Dismissal of [ALI's] Application," in which Unity alleges that positions taken by the Commission in its appeal brief in *Abundant Life* mandate dismissal of ALI's application. In light of our ruling herein, Unity's Motion for Immediate Dismissal of Application IS DISMISSED AS MOOT.

<sup>41</sup> See *Entertainment Unlimited, Inc., Request for Refund of Late Payment Fees for PCS Licenses Purchased in Auction No. 22*, 16 FCC Rcd 10030 (2001) (noting that Commission does not accept instructions regarding the refund of excess upfront payments from entities or individuals other than the payor of record).

<sup>42</sup> 13 FCC Rcd at 15952.